PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1953

No. 243 MISC.

ESTELLE MARRION BROWN,

Petitioner,

vs.

ROSE M. JENSEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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ESTELLE MARRION BROWN,

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable the Associate Justices of the Supreme Court of the United States:

The petition of Estelle Marrion Brown, for a writ of certiorari to be directed to the Supreme Court of the State of California, to review a judgment of that court entered on the 3rd day of July, 1953, rehearing denied on the 28th day of July, 1953, remittitur issued on the 3rd day of August, 1953, in favor of respondent herein and against petitioner herein, respectfully shows:

I.
The Case.

The case was brought to recover the sum of $7,200.00, plus interest, costs, and attorneys fees for failure to pay as per terms and conditions set out in a certain promissory note, and was tried in the Superior Court, State of California, County of Los Angeles, and resulted in a verdict in favor of petitioner, plaintiff therein, which verdict the trial judge, upon proceedings duly had, entered judgment for plaintiff, petitioner herein. From the said judgment, respondent, defendant therein, appealed to the District Court of Appeal, State of California.

II.
Judgment of the Trial Court.

The judgment of the trial court was that petitioner, plaintiff therein recover judgment as prayed for in the complaint.

III.
Unanimous Affirmation by District Court of Appeal.

The District Court of Appeal, on appeal unanimously affirmed the judgment of the trial court and directed judgment to be entered in accordance with the verdict; and held that petitioner, plaintiff and respondent therein, was entitled to judgment as entered by the trial court; *and held that the note sued upon was not a deficiency judgment* under Section 580b, Code of Civil Procedure, State of California, inasmuch as there was no security to which the plaintiff could look; all security having entirely become exhausted by reason of foreclosure by private sale instituted by the Trustee under the First Trust Deed, in which foreclosure proceedings your petitioner herein played no part; as appears more fully from the opinion set forth in the record herein at Appendix A.

IV.

Judgment Reversed by the Supreme Court of California With Dissent.

The respondent, defendant and appellant therein, thereafter filed an appeal in the Supreme Court of the State of California. The Supreme Court of the State of California reversed the judgment of the trial court and the judgment of the District Court of Appeal and directed that judgment be entered contrary to the verdict of the trial court and in favor of respondent, defendant therein; and held that under Section 580b, Code of Civil Procedure, plaintiff's action was one for deficiency judgment and in contravention of said section; and hence, plaintiff was estopped under said section from proceeding for a deficiency judgment, as appears more fully in the majority opinion set forth in the record herein at Appendix B. The dissenting opinion of the Supreme Court filed therein, concurs with the unanimous opinion of the District Court of Appeal and the trial court, as appears more fully in the said dissenting opinion set forth in the record herein at Appendix C.

V.

Rehearing Denied by the Supreme Court of California With Dissent.

Rehearing was denied by the Supreme Court of the State of California on the 28th day of July, 1953; the remittitur was filed on the 3rd day of August, 1953; on the 3rd day of November, 1953, the Honorable Justice Stanley Reed, granted petition herein an extension of time, to and including November 13, 1953, to file this petition for writ of certiorari; and this petition is filed on the 12th day of November, 1953.

VI.

The Supreme Court of the State of California Is the Highest Court of Law or Equity in the State of California.

VII.

Summary and Short Statement of Matter Involved.

The following is a summary and short statement of the matter involved:

Petitioner herein, on April 26, 1950, sold to respondent herein, a certain parcel of real estate situated in Los Angeles County, California. As part of the purchase price respondent herein executed a promissory note in favor of Glendale Federal Savings and Loan Association in the sum of $11,300.00. As security therefore they signed a first trust deed of trust naming the savings and loan association as beneficiary. At the same time, and as part of the purchase price, respondent herein signed a promissory note in favor of petitioner herein, the vendor of the property, in the sum of $7,200.00 with interest at the rate of 5% per annum from the date of the note, the principal payable monthly in instalments of $72.00 each on the 15th day of each month beginning June 15, 1950, plus interest. The note also provided for the payment of a reasonable attorney's fee should suit be commenced to enforce payment thereof. As security for this note the respondent herein signed a second deed of trust upon the property with petitioner herein as beneficiary. No payments were made on any of the promissory notes executed by the respondent herein.

On April 9, 1951, the real property was sold under a foreclosure of *the first deed of trust and the beneficiary purchased the property for the sum of $11,896.63, retain-*

ing the full amount for itself to include court costs, attorney's fees, and other incidental expenses which were necessarily incurred in enforcing the terms of the promissory note and the first deed of trust. AS A RESULT OF THIS SALE THE SECOND DEED OF TRUST BECAME VALUELESS AS SECURITY FOR THE PROMISSORY NOTE IN THE SUM OF $7,200.00, BOTH HELD BY PETITIONER HEREIN. *Petitioner herein never instituted foreclosure proceedings because the security was exhausted and became valueless as a result of the actions of the first trust deed beneficiary, and if she had done so it would have been no more than an idle act on her part. The law does not compel one to do an idle act.* Manifestly, inasmuch as the first trust deed beneficiary, by its actions, completely exhausted the security for itself and in its own interests, rendering all of the security valueless as against petitioner herein, petitioner could not possibly look to any security and was left with no choice but to bring a straight action on the promissory note. Moreover, the statute gives the right to petitioner herein to proceed against respondent herein, and to avail herself of the process of the law in seeking protection. Even this right has been denied to petitioner herein. Section 580a of the Code of Civil Procedure, reads in part, as follows:

> ". . . No judgment shall be rendered in any such action until the real property or interest therein has first been sold pursuant to the terms of such deed of trust or mortgage, *unless such real property or interest therein has become valueless.*" (Italics supplied.)

And Section 580b, of the Code of Civil Procedure states as follows:

> "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a

deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.

"Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof."

Obviously then, in the instant case before the bar judgment had in favor of petitioner herein, in the lower court, *it could not be considered a deficiency judgment inasmuch as petitioner herein brought no foreclosure proceedings.* Petitioner herein played no part whatever in causing the sale of the property under the first deed of trust. It appears that the Supreme Court of the State of California *failed to recognize the position of the petitioner herein and has made her an exception to the well established principles and rules as laid down by the said court,* with reference to actions brought by second trust deed beneficiaries where the first trust deed beneficiaries have exhausted the security and caused it to be rendered valueless as against a second trust deed beneficiary. In the instant case before the bar, the Supreme Court of the State of California has stated:

". . . Under Section 726 of the Code of Civil Procedure, there may be only one action for recovery of a debt secured by a trust deed, which action is one of foreclosure. In addition compliance must be had with the conditions of the chapter in which section 726 appears. One of these conditions is that any deficiency judgment is limited to the difference between the fair market value of the property and the amount for which the property has been sold. *It has been held under that section that where the security has been exhausted or rendered valueless through*

no fault of the mortgagee, or beneficiary under a trust deed, an action may be brought on the debt on the theory that the limitation to the single action of foreclosure refers to the time the action is brought rather than when the trust deed was made, and that if the security is lost or has become valueless at the time the action is commenced, the debt is no longer secured. (Italics supplied.) Security-First Nat. Bank v. Chapman, 31 Cal. App. 182, 87 P. 2d 724; Hellman Com. T. & S. Bank v. Maurice, 105 Cal. App. 653, 288 P. 683; Ferry v. Fisk, 54 Cal. App. 763, 202 P. 964; Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502; Otto v. Long, 127 Cal. 471, 59 P. 895; Savings Bank v. Central Market Co., 122 Cal. 28, 54 P. 273; Commercial Bank v. Kershner, 120 Cal. 495, 52 P. 848; Merced Security v. Casaccia, 103 Cal. 641, 37 P. 648; Salter v. Ulrich, 22 Cal. 2d 263, 138 P. 2d 7, 146 A. L. R. 1344; Republic Truck Sales Corp. v. Peak, 194 Cal. 492, 229 P. 331. *That rule has been applied in favor of a second mortgagee, the security being considered lost or valueless as to him, where a first mortgagee forecloses his mortgage and the property is sold for no more than the senior debt and a deed has been given.* (Italics supplied.) Savings Bank v. Central Market Co., *supra*, 122 Cal. 28, 54 P. 273; Giandeini v. Ramirez, 11 Cal. App. 2d 469, 54 P. 2d 91."

Thus, from the facts established, the instant case before the bar is on all fours with the prior decisions of the Supreme Court of the State of California. *This then places petitioner herein in a class different than other creditors involving the identical facts and circumstances;* denies her due process of law and the equal protection of the law, and is in contravention of the 14th Amendment of the Constitution of the United States. In addi-

tion, with respect to petitioner herein, the law of the State of California has altered her position in that the State of California has impaired the obligation of a contract, and her right of contract, in violation of Article 1, Section 10 of the Constitution of the United States. Moreover, Section 580b of the Code of Civil Procedure, standing by itself, with reference to the parties involved or others who may become involved in similar situations and circumstances is contrary to Article I, Section 10 of the Constitution of the United States, and Article XIV of the Amendments to the Constitution of the United States.

(a) This law impairs the obligation of contracts.

(b) It places creditors in different classes. It makes an unsecured promissory note more valuable than a promissory note with security or collateral. It permits one class of trust deed beneficiary to obtain a deficiency judgment while denying the same right to another class trust deed beneficiary. It thus distinguishes between trust deed beneficiaries and separates them into classes.

(c) It denies certain creditors due process of law in that it fails to provide the machinery and the manner and means by which a creditor who takes his note and security as part consideration of the sale can enforce payment and seek full redress and satisfaction on the obligation; whereas, on the other hand it permits other lenders not parties to the original sale to enforce collection by way of sale and deficiency judgment; as well as other lenders not taking as security a chattel mortgage, mortgage, or deed of trust together with a promissory note and in these instances provides the machinery and the manner and

means of collection or compliance of the existing obligation by judgment or decree by availing themselves and resorting to the court of the state for enforcement thereof.

VIII.

Reason Relied on for the Allowance of the Writ.

The reasons relied on for the allowance of the writ are:

That the Supreme Court of the State of California has decided a federal question of substance in a way probably not in accord with applicable decisions of this court, to-wit: can the state, by legislation, refuse to give relief to a creditor, who, together with obtaining a promissory note (for a debt arising out of a legal valid transaction, not contrary to public policy, nor contrary to statute), also obtains as security therefore a second deed of trust; and because of the said security becoming exhausted and rendered valueless by virtue of foreclosure by beneficiary of the first deed of trust, compel the creditor to forego his right and deny judgment; *then turn about and protect the signer of the promissory note against enforcement thereof, as though he had never signed the instrument, or as if it were obtained by fraud or contrary to statute or public policy?* Can a state, by legislation, compel a creditor to proceed first against the security of the debtor arising out of the transaction, and if the security proves to be insufficient deny the creditor judgment for the difference between the sale price and actual contracted amount? Can the state, by legislation, separate beneficiaries of second deeds of trust into two classes, *i. e.*, one class who may proceed against the security and obtain a deficiency jugment; and the other class who may neither proceed against the security because the security does

not exist, and if permitted to proceed against the security, if the security does exist prevent such class from obtaining a deficiency judgment? Can the state, by legislation, divide into classes, holders of promissory notes without security and permit enforcement while denying enforcement to certain holders of promissory notes where security is part of the transaction? The California Legislature has divided payees of primissory notes into several different classes, providing a separate and distinct procedure of enforcement as to each; and in certain cases limiting the liability of the debtor, notwithstanding the amount of the obligation. These promissory notes are divided into classes showing the procedure permitted in each instance, as follows:

CLASS ONE: A promissory note without collateral or security therewith. Without restriction or conditions, except as stated in the said promissory note, upon default the payee may proceed to collect and enforce payment by obtaining judgment and resorting to the processes of the law in obtaining full satisfaction of the debt.

CLASS TWO: A promissory note with collateral by way of a first mortgage or first deed of trust on real estate for a valid consideration and not as a part of the consideration of the sale of the property. Upon default, the payee must first proceed against the security and after sale may obtain a deficiency judgment if sufficient money is not realized. He may recover the difference between the selling price and the fair market value of the property.

CLASS THREE: A promissory note, with security either by way of a chattel mortgage or conditional sales contract. This promissory note may be given either for consideration of cash or other consideration or may be part of the consideration of the sale. Upon default, the payee

may pass title to the debtor by waiving his rights under the security and proceed against the debtor as in CLASS ONE.

CLASS FOUR: A promissory note with security by way of a first mortgage or first deed of trust on real estate in which the said security and note is a part of the consideration of the selling price. Upon default the beneficiary must proceed against the security and under no condition can he obtain a judgment between the selling price and the fair market value of the property, if the security proves to be insufficient, regardless of the variance as to the difference in the amounts.

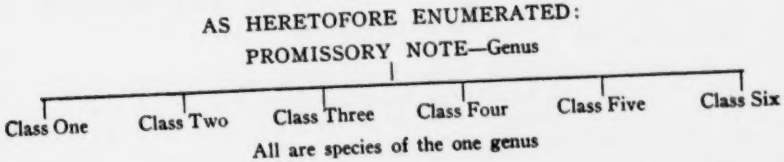
CLASS FIVE: A promissory note with security by way of a junior mortgage or junior deed of trust on real estate, which is not part of the consideration of the sale. Upon default, the beneficiary must proceed against the security and may obtain a deficiency judgment if sufficient money is not realized by the sale. He may recover the difference between the selling price and the fair market value. Also, if the beneficiary of the first mortgage or first deed of trust has caused the security to become exhausted or became valueless, or if it has otherwise become valueless through no fault of his, the said beneficiary may proceed against the debtor as in CLASS ONE.

CLASS SIX: A promissory note, with security, by way of a junior mortgage or junior deed of trust on real estate which is part of the consideration of the selling price. Upon default, the beneficiary must proceed against the security. If the security is there he must proceed to foreclose and must accept as full payment in satisfaction, all that is received from the sale of the property less the amounts due on prior mortgages or deeds of trusts, or other prior liens of record including taxes due and

other expenses incidental thereto in foreclosure proceedings. *However, if the security has been exhausted and rendered valueless, by foreclosure proceedings by the first mortgage or first deed of trust beneficiary or has otherwise become valueless through no fault of his, this beneficiary's promissory note has become extinguished and he can in no way enforce collection or resort to the law or apply for relief to the courts. He must accept the full loss and the debt is wiped out by operation of law.*

Thus, we have six different classes of promissory notes. Each affords different remedies and different procedure for enforcement. *And under one class there is a time where no relief whatever is granted the beneficiary. He must accept the full loss of his investment.* This is confiscatory in favor of private parties and imposes a penalty and forfeiture. This is contrary to the provisions of the United States Constitution and its Amendments. Further, the division into SIX CLASSES of promissory notes and the manner and means of enforcing them are contrary to Article I, Section 10, of the United States Constitution and Article XIV of the Amendments to the United States Constitution. A beneficiary under any note, whether with or without security; whether, as the result of a sale, or otherwise, shall be guaranteed the right to seek full recovery of the obligation and be able to pursue his remedy under a uniform law giving the said beneficiary the right to either first pursue against the debtor *in rem* and recover judgment for the full amount of the promissory note obligation; or, if he chooses, begin his action *in personam*, obtain judgment, then look to the assets of the debtor. In this manner, all beneficiaries of promissory notes are treated equally and alike and may resort to the courts for relief and protection upon default of the obligation. Uniformity of protection thus will eliminate the

different remedies of the SEVERAL CLASSES OF PROMISSORY NOTES. As it now stands, each promissory note, as distinguished by its individual classes as heretofore enumerated, is a genus of its own, encompassing its particular class of species within its orbit. This should not be so. There should be but one genus with its variety of species, each species to be afforded like and equal protection as afforded the genus of the species. For example, A PROMISSORY NOTE IS THE GENUS encompassing within its orbit the many varieties and species. If the genus is afforded protection and process of law then all of its species should be afforded like and equal protection. ONE SHOULD NOT BE PENALIZED MERELY BECAUSE HE BARGAINED FOR AND RECEIVED COLLATERAL OR SECURITY FOR THE OBLIGATION. So, if the promissory note is the genus, all species must fall within this class, as follows:



Thus, all must then obtain the equal protection of the law. The obligation of a contract, protected by Federal and State Constitutions, is not derived solely from the acts and stipulations of the parties, independently of existing law, but has vitality and subsists apart from the stipulations expressed by the parties. *Viewed from another standpoint, it consists in that which a person has undertaken to perform, and it is a legal, not a mere moral, obligation.*[1] *The Constitution makes no discrimination whatever between different kinds or classes of contracts.*

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[1] *Ogden v. Saunders,* 12 Wheat. (U. S.) 213, 6 L. Ed. 606.

By its terms and its spirit, it comprehends and takes under its protection all that are valid of every description,[2] *whether executed or executory,*[3] *express or emplied.*[4] A distinction is also drawn between the obligation of a contract and the remedy given by the Legislature to enforce that obligation. The rule is universally approved that without impairing the obligation of the contract the remedy may be modified at the discretion of the legislative body. *While a remedy may be modified, it cannot be taken away, for the right to property necessarily implies a right* to process of law to protect it.[5]

The economy of the entire country is geared to installment buying and this has been particularly true and more

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[2]*Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 41 L. Ed. 1165, 17 S. Ct. 718; *Stephens v. Southern P. Co.,* 109 Cal. 86, 41 Pac. 783.

A contract valid when made is within the constitutional protection precluding the Legislature from impairing contract obligations. (*Filipkowski v. Springfield F. & M. Ins. Co.,* 206 Wis. 39, 238 N. W. 828, 78 A. L. R. 613.

[3]*Farrington v. Tennessee,* 95 U. S. 679, 24 L. Ed. 558.

An executory contract within the meaning of the constitutional provision as to impairment of contracts is one in which a party binds himself to do or not to do a particular thing. (*Fletcher v. Peck,* 6 Cranch (U. S.) 87, 3 L. Ed. 162.)

[4]*Crane v. Hahlo,* 258 U. S. 142, 66 L. Ed. 514, 42 S. Ct. 214; *Morley v. Lake Shore & M. S. R. Co.,* 146 U. S. 162, 36 L. Ed. 925, 13 S. Ct. 54.

The constitutional provision against the impairment of contracts is not limited to express contracts and specific agreements but includes all cases *where the law completes the contract by implying an obligation upon the part of one of the parties thereto to make compensation.* (*Seton v. Hoyt,* 34 Ore. 266, 55 Pac. 967, 43 L. R. A. 634, 75 Am. St. Rep. 641.)

[5]*Cook v. Gray,* 2 Houst. (Del.) 455, 81 Am. Dec. 185; *Re Fidelity State Bank,* 35 Idaho 797, 209 Pac. 449, 31 A. L. R. 781; *Williams v. Johnson,* 30 Md. 500, 96 Am. Dec. 613.

prevalent in the past years since the start of the war. And, since the end of the war has mounted even disproportionately in many instances. Household utilities, automobiles, radios, television sets, refrigerators, and numerous other items, even clothing and food are purchased on the installment plan. Houses and homes for generations could not be purchased lest an installment plan were available to and obtainable by the buyer. As a result of the war, the country has gone through an inflationary period, and the law exacted controls and enacted legislation governing purchases on installment buying, regulating the terms of sale as to down payments and duration of the obligation, in an effort to curb inflation. Nevertheless, inflation crept in and the cost of homes mounted disproportionately, especially in those locations where a tremendous over-population and acute housing shortage existed, as in the Los Angeles area. As a result homes costing but $7,000.00 in pre-war days mounted to as high as $30,000.00 in post war days. The acute housing shortage caused the prices to mount and residents were forced to pay exorbitant prices. But as water seeks its own level, the law of supply and demand in houses found its own level and the inflated prices of homes came to be considered the norm for the particular period, location and circumstances. These prices were thus stabilized and pegged as the fair market value of the particular home. Some people were fortunate, and they had sufficient money to meet the difference in cash between the amount the lending institution would lend on a first mortgage or first deed of trust and the selling

price. Others were not so fortunate; they had to arrange for secondary financing to enable them to obtain housing and could give no other security than the home, subject to the prior first mortgage or first deed of trust. *Then, if the first lien holder foreclosed and at private sale and bid in the property, extinguishing the security, the second and subsequent lien holders could proceed no further if the consideration was part of the purchase price.* Thus, if A sold a home to B for $20,000.00 and the bank would lend only 50% of the appraised value either by operation of law or as a matter of policy, and the seller wishing to be generous and helpful to the purchaser (maybe he doesn't need the money immediately or wishes to invest at 5% interest, feeling the buyer is a good risk) takes only $2,000.00 as a down payment and a promissory note together with a trust deed[6] as security therefore, in the amount of $8,000.00, we have a completed transaction for $20,000.00, broken down as follows:

Down Payment	$ 2,000.00
1st Trust Deed	10,000.00
2nd Trust Deed	8,000.00
Total	$20,000.00

Now, if per chance, the buyer has defaulted in both the first and second mortgages as in the instant case before the bar, and the first mortgage beneficiary forecloses and exhausts the security rendering it valueless, the seller according to law, being estopped from proceeding in any manner,[7] *it means that he has sold the property for but*

[6, 7] This would not be true if the seller were to take a straight promissory note without any collateral or security. Given the same set of facts, conditions, and circumstances, if the seller were to take back a straight note, without the collateral or security, by way of a mortgage or deed of trust, he could proceed according to law, and resort to process of law and reduce the obligation to judgment.

$12,000.00, and was not permitted to receive the fair, going market value; let alone, his agreed purchase price. THIS, THEN MEANS THAT THE STATE HAS CONTROLLED THE PRICE OF REAL ESTATE AND PEGGED THE PRICE AT THE DOWN PAYMENT PLUS THE AMOUNT OF THE FIRST MORTGAGE, FOR THIS CLASS OF PROMISSORY NOTE BENEFICIARIES; WHEREAS. OTHER SELLERS AND PROMISSORY NOTE BENEFICIARIES ARE NOT SO CONTROLLED AND RESTRICTED. *This further means that the state has confiscated $8,000.00 for the benefit of the buyer and altered a valid existing agreement.* Putting it another way, supposing that A purchased this home for $20,000.00 cash and because of necessity was compelled to move to another city either because of his health or because his employment required it, and then sold the property under the exact terms and conditions to B, as above outlined, and the same conditions came about as a result of the first mortgage beneficiary foreclosing and extinguishing, exhausting and rendering the security valueless, *then it goes a step further and the State actually confiscates for a private party and terminates a valid existing agreement which was good when made and entered into between the parties; and actually, finally and completely divests the seller of $8,000.00 in cash which he originally expended in purchasing the home.*

Thousands of sellers as well as petitioner herein fall within the classes just above illustrated. It then means that the buyers who have given a junior mortgage or deed of trust, CAN, by collusion with the first mortgage or deed of trust beneficiary, actually purchase and in fact have purchased the real estate, *not for the agreed price, but for the agreed price less the amounts due under the*

junior deed of trust. Following this line of reasoning the State of California, in effect says:

> "If you want to sell your home, and take back a second mortgage or second deed of trust as security for a promissory note, don't do it; *you can't look to us for guaranteed protection of the selling price; but if you want protection for the selling price, don't take back a second deed of trust with the promissory note, forget about the security; just take a straight promissory note without security.*"

Being unable to look to the State for protection of a promissory note with security in the nature of a junior deed of trust or junior mortgage, sellers and lenders cannot with impunity look to the law for protection. This law and ruling if permitted to stand will frustrate the sale of real property and rupture the economy of the State of California.

IX.

Your petitioner presents to this court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record of the case, as the same appears in the Supreme Court of the State of California.

Conclusion.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court to the Supreme Court of the State of California, to the end that the judgment of the Supreme Court of the State of California may be reviewed by this Honorable Court.

Respectfully submitted,

BERTRAM S. HARRIS,
Counsel for Petitioner.

ALVIN GERSHENSON,
Of Counsel.

Certificate of Counsel.

I, the undersigned, Bertram S. Harris, Counsel for Petitioner herein, hereby certify that in my judgment and opinion the foregoing Petition for a Writ of Certiorari is well founded and that it is not interposed for the purpose of delay.

BERTRAM S. HARRIS,

APPENDIX A.

Opinion of the District Court of Appeal.

McCOMB, Justice.

This appeal is from a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the amount due on a promissory note.

Facts: On April 26, 1950, defendant and Leota I. Triplett purchased from plaintiff a parcel of real property situated in the county of Los Angeles. As part of the purchase price defendant and Leota Triplett executed a promissory note in favor of Glendale Federal Savings and Loan Association in the sum of $11,300. As security therefor they signed a first deed of trust naming the savings and loan association as beneficiary. At the same time, and as a part of the purchase price, they signed a promissory note in favor of plaintiff, the vendor of the property, in the sum of $7,200 with interest at the rate of 5% per annum from the date of the note, the principal payable monthly in instalments of $72.00 each an the 15th day of each month beginning June 15, 1950, plus interest. The note also provided for the payment of a reasonable attorney's fee should suit be commenced to enforce payment thereof. As security for this note they signed a second deed of trust upon the property with plaintiff as beneficiary.

On September 15, 1950, plaintiff signed a promissory note in favor of Morris and Rae Comess in the sum of $2,075 with interest at the rate of 10% per annum, payable on or about May 15, 1951. As security for this note plaintiff assigned the above mentioned promissory note in the sum of $7,200 to the Comesses, together with the deed of trust securing it.

No payments were made by defendant or Leota Triplett on account of either promissory note which they had executed, and on November 10, 1950, the Comesses as assignees of the second deed of trust caused notice to be given of default and election to sell the real estate property under the second deed of trust.

On December 14, 1950, Glendale Federal Savings and Loan Association caused to be given notice of default and election to sell the real property under the first deed of trust.

On April 9, 1951, the real property was sold under a foreclosure of the first deed of trust and the beneficiary purchased the property for the sum of $11,896.63. As a result of this sale the second deed of trust became valueless as security for the note in the sum of $7,200.

Thereafter plaintiff instituted the present action to collect the amount due on the promissory note signed by defendant.

Question: Is the holder of a note which has been secured by a purchase money second deed of trust barred from bringing action on the note after the security becomes valueless by reason of the sale of the security by the holder of the purchase money first deed of trust?

No. This identical question was before the court in Hillen v. Soule, 7 Cal. App. 2d 45, 45 P. 2d 349, and answered contrary to defendant's contention.

Section 580b of the Code of Civil Procedure reads in part as follows:

"No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property. * * *"

In answering the contention which defendant here makes, that the foregoing provision of the Code of Civil Procedure barred plaintiff's cause of action, the court in Hillen v. Soule, *supra,* 7 Cal. App. 2d at page 47, 45 P. 2d at page 349 said:

"Appellant first contends that this is an action for a deficiency judgment after a sale under a deed of trust given to secure the balance of the purchase price of real property, and that such action cannot be maintained by reason of the provisions of section 580b of the Code of Civil Procedure. It is a sufficient answer to state that this is not an action for a deficiency judgment. The security was exhausted by the sale under the first deed of trust and no sale was had under respondent's deed of trust. We are therefore of the opinion that the provisions of said section are inapplicable."

Affirmed.

MOORE, P. J., and FOX, J., concur.

APPENDIX B.

Opinion of the California Supreme Court.

CARTER, Justice.

Defendants appeal from a judgment for plaintiff on a promissory note.

Plaintiff was the owner of real property which, on April 26, 1950, she sold to defendants, Rose Jensen and Leota Triplett. As a part of the purchase price and on the same day, defendants executed in favor of Glendale Federal Savings & Loan Association (hereafter called Federal) a note for $11,300, secured by a first trust deed on the property. At the same time, and also as a part of the purchase price, a second note was executed by them in favor of plaintiff for $7,200, secured by a second trust deed on the property. Hence both trust deeds were purchase money trust deeds.

It does not appear from the pleadings or findings how the first trust deed was "foreclosed," that is, whether by court action or by the exercise of the power of sale thereunder. While it is stated simply that the property was "sold under foreclosure," it appears from the affidavits on motion for a summary judgment that the sale was under the power of sale in the trust deed. Neither of the notes had been paid and Federal had the property sold pursuant to the power of sale and bid it in for $11,896.63, and a trustees' deed was thereupon delivered to Federal. Plaintiff made no attempt to buy the property at the sale so as to protect her second trust deed.

Plaintiff's complaint stated a cause of action on her note, and to meet the claim that but one action could be brought on a debt secured by a trust deed, namely, one

for foreclosure, Code Civ. Proc. §726, alleged that her security (her second trust deed) had become valueless because it had become exhausted by the sale under the first trust deed. Under section 726 of the Code of Civil Procedure, there may be only one action for the recovery of a debt secured by a trust deed, which action is one of foreclosure. In addition compliance must be had with the conditions of the chapter in which section 726 appears. One of these conditions is that any deficiency judgment is limited to the difference between the fair market value of the property and the amount for which the property was sold. It has been held under that section that where the security has been exhausted or rendered valueless through no fault of the mortgagee, or beneficiary under a trust deed, an action may be brought on the debt on the theory that the limitation to the single action of foreclosure refers to the time the action is brought rather than when the trust deed was made, and that if the security is lost or has become valueless at the time the action is commenced, the debt is no longer secured. Security-First Nat. Bank v. Chapman, 31 Cal. App. 2d 182, 87 P. 2d 724; Hellman Com. T. & S. Bank v. Maurice, 105 Cal. App. 653, 288 P. 683; Ferry v. Fisk, 54 Cal. App. 763, 202 P. 964; Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502; Otto v. Long, 127 Cal. 471, 59 P. 895; Savings Bank v. Central Market Co., 122 Cal. 28, 54 P. 273; Commercial Bank v. Kershner, 120 Cal. 495, 52 P. 848; Merced Security v. Casaccia, 103 Cal. 641, 37 P. 648; Salter v. Ulrich, 22 Cal. 2d 263, 138 P. 2d 7, 146 A. L. R. 1344; Republic Truck Sales Corp. v. Peak, 194 Cal. 492, 229 P. 331. That rule has been applied in favor of a second mortgagee, the security being considered lost or valueless as to him, where a first mortgagee fore-

closes his mortgage and the property is sold for no more than the senior debt and a deed has been given. Savings Bank v. Central Market Co., *supra,* 122 Cal. 28, 54 P. 273; Giandeini v. Ramirez, 11 Cal. App. 2d 469, 54 P. 2d 91.

It would appear from the facts here presented that plaintiff has brought herself within those rules and hence section 726 is not an obstacle to her action on the promissory note. There are, however, additional restrictions on deficiency judgments on secured debts. Defendants pleaded section 580b of the Code of Civil Procedure,[1] and as seen the facts here show that plaintiff's second trust deed is clearly a purchase money trust deed. It is urged, however, that inasmuch as there has not been a sale by plaintiff under her trust deed within the wording of section 580b, *supra,* it does not apply. It is further urged that it does not apply because the security has become valueless by reason of the sale under Federal's first trust deed, and the case is not one involving a "deficiency" as there cannot be a deficiency if there is no security to sell because it presupposes a partial satisfaction of the debt by a sale which exhausts the security.

In order to solve this question there must be a further examination of the Code sections. There are other re-

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[1]"No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property.

"Where both a chattel mortgage and a deed or trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under any one thereof." Code Civ. Proc., §580b.

strictions besides section 726, *supra,* and 580b, *supra.* Section 580a applies the fair market value test of section 726 to sales made without court assistance under a power of sale contained in a trust deed. Section 580d goes further and provides that no judgment shall be rendered for any deficiency on a note secured by a trust deed where the property has been sold under the power of sale (as distinguished from a sale in a foreclosure action) contained in the trust deed. These provisions indicate a considered course on the part of the Legislature to limit strictly the right to recover deficiency judgments, that is, to recover on the debt more than the value of the security. Next comes section 580b, *supra,* here involved, which deals with a special type of security transaction, a trust deed, given to secure to the vendor of property the purchase price agreed to be paid by the vendee. That section is necessarily intended to provide a protection for the trustor because if it were intended to cover only the situation where there has been an actual sale of the security under the power of sale in the trust deed, it would be superfluous. Section 580d covers precisely that situation in *all* trust deeds, whether purchase money or otherwise. The broad protection provision, Code Civ. Proc. §580b, for purchase money trust deeds stands on a reasonable footing. A purchase money trust deed is not like an ordinary trust deed and note upon which only one action may be brought under section 726. Under section 726, as above stated, it is held that whether there is a security is determined as of the time the action is commenced and if the security is lost or has become valueless, an action on the note will lie because the events which caused it to become valueless were beyond the control of the trustor and were not contemplated at the time the

money was loaned and the trust deed given. With purchase money trust deeds, however, the character of the transaction must necessarily be determined at the time the trust deed is executed. Its nature is then fixed for all time and as so fixed no deficiency judgment may be obtained regardless of whether the security later becomes valueless.

The question is, therefore, did plaintiff take a purchase money trust deed on the property when it was purchased? If she did, then section 580b is applicable and she may look only to the security. That is the clear import of the wording of section 580b. The one taking such a trust deed knows the value of his security and assumes the risk that it may become inadequate. Especially does he know the risk where he takes, as was done here, a second trust deed. It is true that the section speaks of a deficiency judgment after sale of the security but that means after an actual sale or a situation where a sale would be an idle act, where, as here, the security has been exhausted. The deficiency judgment which cannot be obtained is still a deficiency judgment even though it may consist of the whole debt because a deficiency is nothing more than the difference between the security and the debt, or, as was said in Carr v. Cleveland Trust Co., Ohio App., 74 N. E. 2d 124, 128 (in dealing with a case where the sale under the first mortgage produced only enough to pay it and the effect of a two-year limitation period for obtaining a deficiency judgment on a mortgage secured debt against the holder of a note secured by a second mortgage): "But in whatever light we view the proceedings

which took place, either by way of foreclosure or by separate personal judgment on the note, one fact stands out in bold relief and that is that a deficiency judgment resulted from the entire proceedings by reason whereof the plaintiffs are entitled to whatever benefits accrue from the provisions of the deficiency judgment act so-called." Indeed the purpose of section 580b is that "* * * for a purchase money mortgage or deed of trust the security alone can be looked to for recovery of the debt." Mortgage Guarantee Co. v. Sampsell, 51 Cal. App. 2d 180, 185, 124 P. 2d 353, 355. The section states that in *no event* shall there be a deficiency judgment, that is, whether there is a sale under the power of sale or sale under foreclosure, or no sale because the security has become valueless or is exhausted. The purpose of the "after sale" reference in the section is that the security be exhausted and that result follows after a sale under the first trust deed.

The foregoing construction of section 580b is further fortified by the last paragraph thereof, *supra,* for it provides that where a chattel and real property mortgage are given to secure the purchase price of real and personal propetry, no deficiency judgment shall be given at *any time* under either of them.

Plaintiff relies on Hillen v. Soule, 7 Cal. App. 2d 45, 45 P. 2d 349, involving an action on a promissory note secured by a purchase money trust deed which was inferior to a first trust deed which was foreclosed and the security thereby exhausted. It was held that section 580b was not applicable because plaintiff's action was not

for a deficiency judgment as the security was exhausted and plaintiff had not sold under his trust deed. That conclusion is out of harmony with the foregoing discussion. Evidently the factors above discussed were not called to the court's attention. In the later case of Mortgage Guarantee Co. v. Sampsell, *supra,* 51 Cal. App. 2d 180, 185, 124 P. 2d 353, the court states that the security alone may be looked to for payment of a debt secured by a purchase money trust deed. However, the result reached in the Hillen case was correct because the trust deeds there were given in 1927 before the adoption of section 580b (section 580b was added to the Code of Civil Procedure in 1933, Stats. 1933, p. 1673) and hence that section could not have been applicable there.

The judgment is reversed and the court directed to enter judgment for defendants.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

APPENDIX C.

Dissenting Opinion of the Supreme Court.

SPENCE, Justice.

I dissent.

The majority opinion declares that "section 726 is not an obstacle" to plaintiff's action on her promissory note, but it holds that plaintiff's action is one for a "deficiency judgment" within the meaning of section 580b of the Code of Civil Procedure and is therefore barred by the terms of that section. I cannot agree with this last mentioned conclusion. The security afforded by plaintiff's *second* deed of trust was extinguished by the sale held under the power of sale in the first deed of trust. Threfore there never had been a sale under the power of sale contained in plaintiff's second deed of trust.

A reading of sections 580a, 580b, 580c and 580d of the Code of Civil Procedure makes it entirely clear that the words "deficiency judgment" are consistently used therein in their ordinary meaning. They refer to a judgment sought for the balance allegedly due upon the personal obligation imposed by a written instrument secured by a deed of trust or mortgage "following the exercise of the power of sale in *such* deed of trust or mortgage * * * ." Code Civ. Proc., §580a; emphasis added, and where "the real property has been sold by the mortgagee or trustee under power of sale contained in *such* a mortgage or deed of trust," Code Civ. Proc., §580d; emphasis added.

The decisions in this state show that this is the meaning which has been heretofore given to the words "deficiency judgment," as used in section 580a. Hatch v. Security-First Nat. Bank, 19 Cal. 2d 254, 258, 120 P. 2d

869; Bank of America etc. Ass'n v. Gillett, 36 Cal. App. 2d 453, 456, 97 P. 2d 875; see Bank of America etc. Ass'n v. Hunter, 8 Cal. 2d 592, 597-598, 67 P. 2d 99; Everts v. Matteson, 21 Cal. 2d 437, 448, 132 P. 2d 476,

It is also the common meaning attached to the term in other jurisdictions. Phillips v. Union Central Life Ins. Co., 8 Cir., 88 F. 2d 188, 189; Bank of Douglas v. Neel, 30 Ariz. 375, 247 P. 132, 133; Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569, 135 So. 795, 797; Harrow v. Metropolitan Life Ins. Co., 285 Mich. 349, 280 N. W. 785, 788; Tiedeman v. Dorn, 137 Misc. 136, 241 N. Y. S. 490, 492-493; Stretch v. Murphy, 166 Or. 439, 112 P. 2d 1018, 1021; Bailey v. Block, 104 Tex. 101, 134 S. W. 323, 325; 59 C. J. S., Mortgages, §777, p. 1474.

Section 580b was originally enacted with section 580a in 1933, Stats. 1933, pp. 1672, 1673, and the meaning of "deficiency judgment" was undoubtedly intended to be the same for both sections. When section 580d was added in 1940, Stats. 1st Ex. Sess. 1940, ch. 29, §2, it was again made clear that "deficiency judgment" referred to a judgment sought for the balance allegedly due a person whose obligation had been secured by a deed of trust or mortgage and where the real property had been sold "under power of sale contained in *such* a mortgage or deed of trust." While sections 580b and 580d do overlap to some extent, section 580b cannot be properly characterized as "superfluous."

In 1935 and shortly after the enactment of section 580b, it was construed with relation to similar facts in Hillen v. Soule, 7 Cal. App. 2d 45, 45 P. 2d 349. It was there said: "Appellant first contends that this is an action for a deficiency judgment after a sale under a deed of trust given to secure the balance of the purchase price

of real property, and that such action cannot be maintained by reason of the provisions of section 580b of the Code of Civil Procedure. It is sufficient answer to state that this is not an action for a deficiency judgment. The security was exhausted by the sale under the first deed of trust and no sale was had under respondent's deed of trust. We are therefore of the opinion that the provisions of said section are inapplicable." 7 Cal. App. 2d at page 47, 45 P. 2d at page 349.

The Legislature has twice amended section 580b since this construction was placed upon the words "deficiency judgment." Stats. 1935, pp. 1806, 1869; Stats. 1949, ch. 1599, §1. As no change was made by these amendments in the phrase "deficiency judgment," it may be assumed that the Legislature approved the construction placed on that term in Hillen v. Soule, 7 Cal. App. 2d 45, 45 P. 2d 349, *supra*. Furthermore, the wording of section 580d as enacted in 1940 also indicates such legislative approval.

The evil motivating the Legislature in enacting these sections was that "creditors were frequently able to bid in the debtor's real property at a nominal figure and also to hold the debtor personally liable for a large proportion of the original debt." Hatch v. Security-First Nat. Bank, *supra*, 19 Cal. 2d 254, 259, 120 P. 2d 869, 872; see 22 Cal. L. Rev. 170, 180. The purpose was not to prevent any recovery where the security had become completely valueless or a senior mortgagee had foreclosed, leaving no security for the junior debt.

Thus, it appears to me that the majority opinion has stretched the meaning of section 580b far beyond its terms. Both sections 580b and 580d prevent the holder of a purchase money deed of trust from having a "de-

ficiency judgment" after a sale under *such* a deed of trust. They do not cover the situation where no sale has been held under *such* deed of trust and no "deficiency judgment" is sought. To so construe these sections results in placing the holder of a purchase money note secured by a second deed of trust in a less favorable position than the holder of an unsecured note given for such purchase money. The Legislature has not so declared. Until it does so, the courts should not enter the legislative field by broadening the terms of statutes beyond their common meaning and contrary to the judicial interpretation which had been placed thereon prior to the time that the parties entered into their contractual relations.

The majority opinion relies on Mortgage Guarantee Co. v. Sampsell, 51 Cal. App. 2d 180, 124 P. 2d 353. It is sufficient to state that that case did not present the question here involved. The broad language quoted by the majorirty opinion is mere dictum, unnecessary to the decision of that case.

I would affirm the judgment.

Rehearing denied; SPENCE, J., dissents.